

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

THOMAS RUDOLF HESSE,

Defendant and Appellant.

B303285

(Los Angeles County
Super. Ct. No. BA201551)

APPEAL from an order of the Superior Court of Los Angeles County, William C. Ryan, Judge. Affirmed.

Richard B. Lennon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, Jonathan J. Kline and Shezad H. Thakor, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Thomas Rudolf Hesse was convicted in 2000 of first degree burglary, unlawfully driving or taking a vehicle, and evading a police officer. Pursuant to the Three Strikes law, he was sentenced to 88 years to life in prison. After passage of Proposition 36, the Three Strikes Reform Act of 2012 (hereinafter Proposition 36 or the Act), the trial court resentenced Hesse on the two eligible Vehicle Code offenses. At resentencing, the court declined Hesse's request to strike the remaining burglary prior pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*), and also declined to strike or dismiss two serious felony enhancements imposed pursuant to Penal Code section 667, subdivision (a).¹

Hesse timely appeals, contending the court's rulings were an abuse of discretion. We disagree, and affirm the court's order.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The offenses, trial, initial sentencing, and first appeal*²

On August 9, 1999, Hesse broke into a Hollywood residence and stole various items, including a computer and a portable stereo.

On May 12, 2000, Mark Jeffries discovered that his Jeep Grand Cherokee was missing from a valet parking lot at the Rusty Pelican restaurant.

¹ All further undesignated statutory references are to the Penal Code.

² We derive the facts and the procedural history in part from our unpublished opinions in *People v. Hesse* (Mar. 5, 2002, B148873 [non-pub. opn.]) and *People v. Hesse* (Nov. 13, 2015, B260384 [non-pub. opn.]), of which we take judicial notice. (Evid. Code, §§ 452, subd. (d), 459.)

On May 24, 2000, a Los Angeles police officer saw Hesse driving away from a motel in Jeffries's Jeep. The officer attempted to make a traffic stop, but Hesse led the officer on a pursuit, during which Hesse drove the wrong way on a one-way street, made unsafe lane changes, exceeded the speed limit, and ran red lights.

A jury convicted Hesse of first degree burglary (§ 459, count 1), unlawfully driving or taking a vehicle (Veh. Code, § 10851, subd. (a), count 2), and fleeing from an officer with willful disregard (Veh. Code, § 2800.2, subd. (a), count 3). Hesse admitted suffering two prior serious felony convictions (§ 667, subds. (a), (b)–(i), 1170.12, subds. (a)–(d)) and serving four prior prison terms (§ 667.5, subd. (b).) The trial court sentenced Hesse to 89 years to life pursuant to the Three Strikes law, comprised of consecutive terms of 25 years to life on each of the three counts, plus two 5-year serious felony conviction enhancements (§ 667, subd. (a)), plus four 1-year prior prison term enhancements (§ 667.5, subd. (b)).

This court affirmed Hesse's convictions, but modified the sentence by striking one of the section 667.5, subdivision (b) prior prison term enhancements, resulting in a sentence of 88 years to life. (*People v. Hesse, supra*, B148873.)

2. Hesse's original Proposition 36 resentencing petition and second appeal

On November 6, 2012, California voters approved Proposition 36, which took effect the next day. (*People v. Johnson* (2015) 61 Cal.4th 674, 679–680 (*Johnson*).) Prior to passage of Proposition 36, a defendant convicted of two prior serious or violent felonies was subject to a 25-years-to-life term upon conviction of any additional felony. (*Johnson*, at p. 680.) Under

Proposition 36, a defendant is subject to such a term only if the current, third felony is itself serious or violent, or if certain exceptions apply. (*Id.* at p. 681.) Absent such exceptions, a defendant convicted of a nonserious or nonviolent third felony is sentenced to twice the term otherwise provided for the current felony. (*Ibid.*)

On November 6, 2014, pursuant to Proposition 36, Hesse filed a petition for recall of sentence and resentencing on his Vehicle Code convictions. (§ 1170.126.) The trial court denied the petition, reasoning that Hesse was ineligible because one of his current convictions was for first degree burglary, a serious felony.

Hesse appealed. While his appeal was pending, the California Supreme Court held that a petitioner is eligible for resentencing under Proposition 36 on a current conviction that is nonserious and nonviolent, even if another current conviction is serious or violent. (*Johnson, supra*, 61 Cal.4th at pp. 679–680.) Accordingly, we reversed the trial court’s order and remanded for a new hearing at which it could determine Hesse’s eligibility for recall and resentencing on the two Vehicle Code offenses. (*People v. Hesse, supra*, B260384.)

3. *Proceedings on remand*

On February 29, 2016, the trial court vacated its order denying resentencing and issued an order to show cause why relief should not be granted. The People opposed the petition on the ground resentencing Hesse would pose an unreasonable risk of danger to public safety. After numerous continuances requested by the defense or stipulated between the parties, Hesse filed a reply and supplemental briefs, which included exhibits related to his conduct, accomplishments, and activities while

incarcerated and an expert's report opining that he did not present an unreasonable risk of danger to the public.

On September 23, 2019, defense counsel filed a sentencing memorandum. Therein, Hesse requested that the trial court strike the two section 667, subdivision (a) serious felony enhancements in light of the passage of Senate Bill No. 1393 (2017–2018 Reg. Sess.) (Senate Bill 1393),³ as well as the one-year section 667.5, subdivision (b) enhancements. Hesse also filed a *Romero* motion, requesting that the trial court strike at least one of his prior strikes when sentencing on counts 2 and 3.

A suitability hearing transpired on October 1, 2019. On October 30, 2019, the trial court issued a 16-page memorandum of decision, in which it discussed Hesse's prior criminal history, the commitment offenses, his prison disciplinary history, his institutional programming, including his education and employment, his post-release plans, his age, his anticipated release date if resentenced, and the expert's report. After weighing the evidence, the court concluded that Hesse was eligible for Proposition 36 resentencing on the two Vehicle Code convictions, and his release would not pose an unreasonable danger to public safety.

The court denied Hesse's *Romero* motion and declined to strike the section 667, subdivision (a) serious felony priors or the section 667.5, subdivision (b) enhancements. The court

³ Senate Bill 1393, which took effect on January 1, 2019, gave trial courts discretion to strike section 667, subdivision (a) serious felony enhancements. Prior to Senate Bill 1393's enactment, imposition of such enhancements was mandatory. (*People v. Zamora* (2019) 35 Cal.App.5th 200, 208; *People v. Garcia* (2018) 28 Cal.App.5th 961, 971.)

explained, as to the *Romero* motion, that it was required to consider the nature and circumstances of Hesse's present and prior felonies. It reasoned: "One of the strike priors that Petitioner asks this court to dismiss is a first degree residential burglary from 1989. Petitioner entered a home when no one was present and stole a cassette tape deck and a camera. . . . The second strike prior that Petitioner asks this court to dismiss is another first degree residential burglary from 1991. Petitioner entered two separate homes, when no one was present, and it is unclear whether he took any property from the homes. The court acknowledges that these strike priors occurred nearly 30 years ago. However, the Three Strikes Law was enacted, in part, to deter people from continuing to commit serious crimes. Petitioner's current conviction involves a residential burglary, and these two strike priors were for the same crime. Therefore, those strike priors fall[] squarely within the spirit of the Three Strikes Law."

The court also declined to strike the section 667, subdivision (a) and 667.5, subdivision (b) enhancements. It considered Hesse's argument that his nonviolent criminal history and rehabilitation in prison warranted such a dismissal. However, it reasoned that Hesse's "criminal history reflects either a willful disregard for the Three Strike's Law's purpose, or an inability to abide by the law for a significant period of time. Petitioner's prior felonies occurred close in time to his current conviction and were crimes nearly identical to the commitment offense."

Thereafter, Hesse renewed his request to strike the section 667.5, subdivision (b) priors in light of the passage of Senate Bill No. 136 (2019–2020 Reg. Sess.) (Senate Bill 136).⁴

Resentencing transpired on November 21, 2019. The trial court recalled and vacated the sentence imposed in 2001 as to counts 2 and 3. It also struck the section 667.5, subdivision (b) enhancements. It imposed the upper term of three years consecutive on count 2, unlawfully driving or taking a vehicle, doubled pursuant to the Three Strikes law. On count 3, the subordinate term, it imposed a consecutive sentence of one-third of the midterm, i.e., 16 months, for a total sentence on counts 2 and 3 of seven years four months.

Hesse filed a timely notice of appeal.

DISCUSSION

No abuse of discretion is apparent

Hesse argues that the trial court abused its discretion by declining to grant his *Romero* motion and by refusing to strike the section 667, subdivision (a) serious felony enhancements. We disagree.

In the furtherance of justice, a trial court may strike or dismiss a prior conviction allegation. (§ 1385, subd. (a); *Romero*,

⁴ “Prior to January 1, 2020, section 667.5, subdivision (b) required trial courts to impose a one-year sentence enhancement for each true finding on an allegation the defendant had served a separate prior prison term and had not remained free of custody for at least five years.” (*People v. Jennings* (2019) 42 Cal.App.5th 664, 681.) Effective January 1, 2020, Senate Bill 136 amended section 667.5, subdivision (b), to “limit its prior prison term enhancement to only prior prison terms for sexually violent offenses, as defined in Welfare and Institutions Code section 6600, subdivision (b).” (*People v. Jennings*, at p. 681.)

supra, 13 Cal.4th at p. 504.) As noted, after passage of Senate Bill 1393, a trial court also has discretion to strike or dismiss a section 667, subdivision (a) serious felony enhancement pursuant to section 1385. (*People v. Brooks* (2020) 53 Cal.App.5th 919, 921; *People v. Zamora*, *supra*, 35 Cal.App.5th at p. 208; *People v. Garcia*, *supra*, 28 Cal.App.5th at p. 971.) We review a trial court’s discretionary decision on these issues under the deferential abuse of discretion standard. (*People v. Carmony* (2004) 33 Cal.4th 367, 375 (*Carmony*); *People v. Pearson* (2019) 38 Cal.App.5th 112, 116; *People v. Brooks*, at p. 922.) The party attacking the sentence has the burden to clearly show that the sentencing decision was irrational or arbitrary. (*Carmony*, at p. 376; *People v. Pearson*, at p. 116.) “ ‘ ‘ ‘In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.’ ” ’ ” (*People v. Pearson*, at p. 116.) A “ ‘ ‘ ‘decision will not be reversed merely because reasonable people might disagree. “An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.” ’ ” [Citation.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it.’ ” (*Ibid.*; *Carmony*, at p. 378 [the Three Strikes law “not only establishes a sentencing norm, it carefully circumscribes the trial court’s power to depart from this norm [T]he law creates a strong presumption that any sentence that conforms to these sentencing norms is both rational and proper.”].)

When considering whether to strike or dismiss prior conviction allegations, a court considers “whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme’s spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies.” (*People v. Williams* (1998) 17 Cal.4th 148, 161; *People v. Bernal* (2019) 42 Cal.App.5th 1160, 1170.) When considering whether to strike or dismiss an enhancement, a trial court also considers the factors listed in the relevant California Rules of Court. (*People v. Pearson, supra*, 38 Cal.App.5th at p. 117; *People v. Brooks, supra*, 53 Cal.App.5th at pp. 926–927; Cal. Rules of Court, rules 4.409, 4.410, 4.421, 4.423, 4.428.)

Hesse fails to demonstrate that the trial court abused its discretion here. Hesse’s criminal history began decades ago and continued unabated until his most recent incarceration. In 1981, he was twice convicted of possession of a dangerous weapon. He was also convicted of driving a vehicle without the owner’s consent and disturbing the peace. In 1982, he was convicted of misdemeanor burglary. In 1983, he was convicted of receiving stolen property. In 1985, he was convicted of being under the influence of a controlled substance and possession of a dangerous drug. In 1986, he was convicted of theft. In 1987, he was again convicted of possession of a dangerous weapon. In 1990, he was convicted of grand theft auto, burglary, and theft with a prior. In 1992, he was convicted of two counts of burglary. In 1994, he was convicted of escaping from prison. In 2000, he was convicted of driving with a suspended license. During this period, Hesse

violated parole at least six times. He committed the current offenses of burglary, unlawfully driving or taking a vehicle, and evading an officer, in 1999 and 2000. Given Hesse's record, the trial court did not abuse its discretion in concluding he fell within the spirit of the Three Strikes law and declining to strike the serious felony enhancements. (See *People v. Bernal*, *supra*, 42 Cal.App.5th at p. 1170 [trial court "acted within the applicable standards when it declined, based on defendant's 'unrelenting' criminal behavior, to find that he [fell] outside the spirit of the three strikes law"]; *People v. Gillispie* (1997) 60 Cal.App.4th 429, 434 [trial court may rely on the record of conviction to justify denial of relief under section 1385].)

Moreover, Hesse's prior serious felony convictions, and one of his current convictions, were for burglary. Several of his other prior convictions were theft-related. Thus, Hesse's criminal history demonstrates he is unable or unwilling to follow the law and cease his criminal behavior. (See *People v. Williams*, *supra*, 17 Cal.4th at p. 163 [fact defendant's prior convictions were all for the same offense reflected he had failed or refused to " 'learn his lesson' "].) In sum, Hesse's criminal history demonstrates he is "the kind of revolving-door career criminal for whom the Three Strikes law was devised." (*People v. Gaston* (1999) 74 Cal.App.4th 310, 320; *People v. Pearson* (2008) 165 Cal.App.4th 740, 749.)

Hesse argues that his favorable prison record, including his "constructive programming" and his low prison classification score, demonstrate his entitlement to relief. But, the "presence of mitigating evidence is not enough to render the trial court's decision an abuse of discretion." (*People v. Bernal*, *supra*, 42 Cal.App.5th at p. 1170.) The trial court's memorandum of

decision shows it gave thoughtful and thorough consideration to Hesse's prison records and the evidence propounded by the defense. The fact it weighed Hesse's criminal record more heavily than that information does not demonstrate an abuse of discretion.

Hesse also argues that his criminal record consists of nonviolent property crimes, and his prior strikes were remote in time. But the fact Hesse's prior offenses did not involve actual violence "cannot, in and of itself, take [appellant] outside the spirit of the Three Strikes law when the defendant is a career criminal with a long and continuous criminal history." (*People v. Strong* (2001) 87 Cal.App.4th 328, 345; see also *People v. Anderson* (2019) 42 Cal.App.5th 780, 786.) Moreover, burglary carries a high risk of violence should the intruder and the property owner happen upon each other. " " " " 'Burglary laws are based primarily upon a recognition of the dangers to personal safety created by the usual burglary situation—the danger that the intruder will harm the occupants in attempting to perpetrate the intended crime or to escape and the danger that the occupants will in anger or panic react violently to the invasion, thereby inviting more violence.' " " " " (*Magness v. Superior Court* (2012) 54 Cal.4th 270, 275.)

Although the strike priors are remote in time—a factor expressly noted by the trial court—remoteness has little mitigating force "where, as here, the defendant has led a continuous life of crime." (*People v. Pearson, supra*, 165 Cal.App.4th at p. 749; *People v. Gaston, supra*, 74 Cal.App.4th at p. 321 [remoteness not significant in light of the fact defendant's crimes "spanned his entire adult life"]; *People v. Humphrey* (1997)

58 Cal.App.4th 809, 813 [trial court cannot be expected to “simply consult the Gregorian calendar with blinders on”].)

Hesse urges that because he is already subject to a lengthy term on his current burglary conviction, and will not be released from prison unless and until the Board of Parole Hearings finds him suitable for parole, the court’s refusal to strike the enhancements and prior strike conviction “serves no rational sentencing purpose.” But, the argument that his sentence would be sufficiently harsh even if the court struck one of the prior strikes “is irrelevant. The pertinent question is whether [defendant] was outside the spirit of the Three Strikes law and therefore should be treated as though he were not previously convicted of a serious or violent felony.” (*People v. Anderson, supra*, 42 Cal.App.5th at p. 786.) The trial court expressly considered Hesse’s likely release date and the fact his eventual release was contingent on a decision by the Board of Parole Hearings. We cannot say that the trial court’s decision was irrational or arbitrary. “Where the record demonstrates that the trial court balanced the relevant facts and reached an impartial decision in conformity with the spirit of the law, we shall affirm the trial court’s ruling” (*People v. Myers* (1999) 69 Cal.App.4th 305, 310; see *Carmony, supra*, 33 Cal.4th at p. 378 [it is “‘not enough to show that reasonable people might disagree about whether to strike one or more’ prior conviction allegations”].)

DISPOSITION

The order is affirmed.

**NOT TO BE PUBLISHED IN THE OFFICIAL
REPORTS**

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.